

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
SAN DIEGO METROPOLITAN TRANSIT)	File No. 0005237845
SYSTEM AND SAN DIEGO TRANSIT)	
CORPORATION, CALIFORNIA)	
)	
Request for Waiver of the 800 MHz Wave 4)	
Application Freeze Along the U.S./Mexico Border)	

ORDER

Adopted: February 1, 2013

Released: February 1, 2013

By the Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. On May 30, 2012, San Diego Metropolitan Transit System and the San Diego Transit Corporation (collectively SDTC) filed the above-captioned application for new trunked public safety 806-821/851-866 MHz stations, accompanied by a request for waiver of the Commission's freeze on filing new 800 MHz applications pending reconfiguration of the 806-824/851-869 MHz band (800 MHz band) along the U.S./Mexico border (Wave 4 Freeze).¹ For the following reasons, we deny the waiver request and dismiss the application.

II. BACKGROUND

2. On April 2, 2012, the Board of Regents of the University of California San Diego (Board of Regents) filed applications to cancel its licenses for Trunked Public Safety Stations WPAH209 and WNBX265, La Jolla, California.² The WPAH209 and WNBX265 licenses authorized conventional Public Safety operations on frequency pair 811.4250/856.4250 MHz on Mt. Soledad in San Diego County, California.³ The Commission's licensing staff accepted the cancellations on April 3, 2012.⁴

3. On May 30, 2012, SDTC filed the above captioned application proposing to operate on the same frequency pair and from the same location previously authorized under the Board of Regent's cancelled licenses, as well as at four additional sites not previously authorized under the cancelled licenses.⁵ SDTC proposes to operate its facilities in National Public Safety Planning Advisory Committee

¹ Request for Waiver of Commission Rules by the San Diego Metropolitan Transit System (filed May 30, 2012) (Waiver Request) attached to FCC File No. 0005237845 (filed May 30, 2012).

² FCC File Nos. 0005145091 (*re* WPAH209) and 0005145121 (*re* WNBX265) (April 2, 2012).

³ The license for WNBX265 authorized mobile operations on frequency pair 811.4250/856.4250 MHz with a 56 km radius around the Mt. Soledad site.

⁴ ULS Reference Nos. 5347294 (*re* WPAH209) and 5347290 (*re* WNBX265) Notice of License Cancellation (April 3, 2012).

⁵ Waiver Request at 11-12.

(NPSPAC) Region 5 and requests a waiver of the current freeze on the acceptance of applications in that region.⁶

4. In the *800 MHz Report and Order*, the Commission mandated reconfiguration of the 800 MHz band to eliminate interference to public safety communications in the band.⁷ To maintain a stable spectral environment during reconfiguration of each NPSPAC region, the Commission imposed a freeze on acceptance of new 800 MHz applications during reconfiguration.⁸ The application freeze was in effect when SDTC filed its application⁹ and remains in effect currently.¹⁰

5. SDTC seeks a license for frequency pair 811/856.4250 MHz to expand its Regional Transit Management System (RTMS) and related radio service territory.¹¹ SDTC claims that the additional radio spectrum is required in order for SDTC to have unified command and control of its fleet of 537 buses.¹² Currently, SDTC states that only 236 buses are equipped with RTMS, creating a significant gap in the communication and GPS capabilities of SDTC's operations.¹³ SDTC adds that frequency pair 811/856.4250 MHz "is uniquely situated to fulfill the needs of SDTC's expanded RTMS system while causing no interference to other existing licensees."¹⁴ SDTC submits that the waiver request "is in the public interest because it is necessary to maintain SDTC's safe and efficient operations and to allow SDTC to fulfill its designated emergency response and evacuation role during regional emergencies."¹⁵

III. DISCUSSION

6. We deny SDTC's request for waiver of the Commission's freeze on accepting new applications in the 800 MHz band because it has not met either prong of the Commission's standard for granting waivers. To obtain a waiver of the Commission's Rules a petitioner must demonstrate either that (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;¹⁶ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest or the applicant has no reasonable alternative.¹⁷

⁶ Waiver Request at 8-14.

⁷ In the Matter of Improving Public Safety Communications in the 800 MHz Band, *Report and Order*, WT Dkt No. 02-55, 19 FCC Rcd 14969 (2004) (*800 MHz Report and Order*).

⁸ *Id.* at 15078, ¶ 204.

⁹ See Public Safety and Homeland Security Bureau Extends 800 MHz Rebanding Negotiation Period for Wave 4 Border Area NPSPAC and Non-NPSPAC Licensees Along the U.S.-Mexico Border, *Public Notice*, 27 FCC Rcd 3067 (PSHSB 2012).

¹⁰ Public Safety and Homeland Security Bureau Extends Voluntary 800 MHz Rebanding Negotiation Period for Wave 4 Border Area NPSPAC and Non-NPSPAC Licensees Along the U.S.-Mexico Border Pending Establishment of Negotiation Timetable, WT Docket No. 02-55, *Public Notice*, 27 FCC Rcd 7312 (PSHSB 2012).

¹¹ Waiver Request at 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 1.

¹⁶ 47 C.F.R. § 1.925(b)(3)(i).

¹⁷ 47 C.F.R. § 1.925(b)(3)(ii).

7. The 800 MHz application freeze was established to maintain a stable spectrum environment during 800 MHz rebanding with exceptions only for incumbent public safety licensees that demonstrate a legitimate need for an exception to the freeze.¹⁸ The freeze applies to all 800 MHz frequencies that might be useful in rebanding, not just to those vacated in the course of reconfiguration.¹⁹ “Unlicensed spectrum held by the Commission is made available to the TA as replacement spectrum during the reconfiguration process, whether that spectrum was unlicensed before initiation of a suspension period or whether it became unlicensed during the suspension period upon cancellation of a license by Sprint Nextel or any other licensee.”²⁰ Further, the Region 5 area is highly congested and the band plan in the area is constrained by the need to protect Mexican licensees.²¹

8. Here, when the Board of Regents canceled its license, the spectrum associated with those licenses was returned to the Commission and became part of its unlicensed 800 MHz spectrum inventory. The TA has since reused the channel as a planned replacement channel for another licensee, thus rendering the channel unavailable. Even if the frequency pair were available, SDTC’s application expands the service and interference contours to a degree that it creates impermissible short-spacing to another licensee also slated to use the channel as a replacement channel. The TA attempted to identify another channel that could accommodate SDTC but without success. Accordingly, we find that grant of SDTC’s waiver request and application would be contrary to the purpose of the Commission’s application freeze in the 800 MHz band.

9. We also find that SDTC has not demonstrated that application of the freeze would be inequitable, unduly burdensome and contrary to the public interest. SDTC claims that there is “no end in sight” to the application freeze.²² We observe that circumstances in Region 5 have changed. Less than two weeks after SDTC filed its application, the Commission concluded negotiations to modify the spectrum-sharing agreements between the United States and Mexico, thereby adopting a revised band plan for the border region.²³ Two months later, the Public Safety and Homeland Security Bureau (Bureau) initiated a proceeding to establish a rebanding timeline for the region.²⁴

¹⁸ See *800 MHz Report and Order*, 19 FCC Rcd at 15078 ¶ 204; *Improving Public Safety Communications in the 800 MHz Band*, WT Dkt No. 02-55, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25129, 25158-59 ¶ 87 (2004); *Wireless Telecommunications Bureau Outlines Application Freeze Process for Implementation of 800 MHz Band Reconfiguration*, WT Docket 02-55, *Public Notice*, 20 FCC Rcd. 8905 (WTB 2005).

¹⁹ See *Third District Enterprises, Order*, 27 FCC Rcd 1980, 1985 ¶ 13 (WTB 2012).

²⁰ *Id.* at 1985 ¶ 14.

²¹ *Id.* at 1985-1986 ¶ 14.

²² Waiver Request at 3.

²³ See *Protocol Between the Department of State of the United States of America and the Secretariat of Communications and Transportation of the United Mexican States Concerning the Allotment, Assignment and Use of the 806-824/851-869 MHz and 896-901/935-940 MHz Bands for Terrestrial Non-Broadcasting Radiocommunication Services Along the Common Border* (June 8, 2012) (Amended Protocol).

²⁴ On August 7, 2012, the Bureau released a *Notice of Proposed Rulemaking* seeking comment on proposals for establishing and implementing the reconfigured 800 MHz channel plan in the Wave 4 NPSPAC regions that fall within the Mexico border. *Improving Public Safety Communications in the 800 MHz Band/New 800 MHz Band Plan for U.S. - Mexico Sharing Zone*, WT Docket No. 02-55, *Fourth Further Notice of Proposed Rulemaking*, 27 FCC Rcd 9563 (PSHSB 2012).

10. Finally, we reject SDTC's argument that the Commission must grant its waiver because the Commission has granted waiver requests "on a much lower showing of public interest."²⁵ In support of its argument, SDTC cites several decisions in which the Commission staff purportedly granted waivers without any discussion of the Commission's 800 MHz rebanding freeze.²⁶ SDTC's reliance on those cases is misplaced. In the majority of those cases, the relevant Wave 1 or Wave 2 non-NPSPAC application freeze expired before the staff decision.²⁷ In the one case addressing the Wave 4 Freeze, we note that (1) the TA did not reuse the spectrum at issue as a replacement channel and (2) the applicant did not impermissibly short-space a relocating co-channel licensee.²⁸ Based on the foregoing, we conclude that grant of SDTC's requested waiver is not warranted. Accordingly, we deny SDTC's request for waiver of the Commission's Wave 4 Freeze.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925(b)(3) of the Commission's rules, 47 C.F.R. § 1.925(b)(3), that the Request for Waiver of Commission Rules, filed on May 20, 2012, by the San Diego Metropolitan Transit System and the San Diego Transit Corporation IS DENIED.

12. IT IS FURTHER ORDERED that the Policy and Licensing Division of the Public Safety and Homeland Security Bureau SHALL DISMISS application FCC File No. 0005237845 in accordance with this *Order* and the Commission's rules.

13. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm, Deputy Chief
Policy and Licensing Division
Public Safety and Homeland Security Bureau

²⁵ Waiver Request at 9-11.

²⁶ *Id. citing* Ameren Services Co., *Order*, 25 FCC Rcd 12596 (WTB MD 2010) (granting a waiver to permit Business/Industrial/Land Transportation operations on a public safety frequency); American Electric Power Service Corp., *Memorandum Opinion and Order*, 21 FCC Rcd 4176 (WTB 2007) (granting a waiver of the inter-category sharing freeze); Ameren Services Co., *Order*, 21 FCC Rcd. 6329 (WTB 2006) (granting a waiver of the inter-category sharing freeze); State of Delaware, *Order*, 21 FCC Rcd. 6332 (WTB 2006) (granting a waiver of the inter-category sharing freeze); County of Cumberland, *Order*, 21 FCC Rcd. 9089 (WTB 2006) (granting a waiver of the inter-category sharing freeze); and County of Tompkins, *Order*, 22 FCC Rcd. 10215 (PSHSB 2007) (granting a waiver of the inter-category sharing freeze and wave 4 application freeze in the U.S.-Canada border area).

²⁷ *See, e.g.*, American Electric Power Service Corp., 21 FCC Rcd at n.2 (noting that the Wave 2 non-NPSPAC application freeze expired). The Wave 1 and Wave 2 non-NPSPAC application freezes expired on February 8, 2006 and May 12, 2006, respectively.

²⁸ *See* County of Tompkins, *Order*, 22 FCC Rcd 10215.